that this is the first circuit to address such an issue is simply the reflection of the expanded breadth of judicial oversight that follows from the Ninth Circuit's decision to jettison the APA in favor of *de novo* ESA review and perpetual reviewability. The underlying issue concerning the relationship between FIFRA and the ESA is independently important, however – especially so in conjunction with the *de novo*/continuing violation/no APA review issue described above. Its importance arises because the question lies at the intersection of two major federal environmental statutes, because Congress has spoken to the statutory interplay (and the Ninth Circuit's approach conflicts with congressional intent), because the Ninth Circuit will become the forum of choice for litigants seeking injunctions against a wide variety of pesticides, because the type of injunction approved by the Ninth Circuit creates risks to the Nation's food and fiber supplies, and because the Ninth Circuit's ruling imposes a substantial new burden on EPA and, by extension, on pesticide manufacturers and users.

The Ninth Circuit has imposed an apparently continuing duty on EPA to review the pesticides it has approved to

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(continued) . . .

Defenders, the *registration itself* was found to constitute a substantive violation of the ESA's "take" prohibition. The court held that the ESA's citizen suit provision, by authorizing suit to "enjoin" a "violation" of the ESA, enabled the district court to enjoin the continued registration of strychnine without requiring plaintiffs to follow FIFRA's process for canceling a pesticide registration. *Id.* at 1298-1300. Here, in contrast, the alleged violation was not the registrations *per se*, but the failure to consult. The appropriate remedy for this procedural violation would be simply to enjoin EPA to complete any requisite ESA procedures, not to suspend the registrations without regard to FIFRA's process for doing so.

determine whether there is, at *any* time, information requiring a different effects determination and, if so, to engage in ESA § 7 consultation. *See* Pet. at 20-22.[7] The burden is large and manifestly at odds with the views and longstanding practices of the federal agencies that must administer and adhere to FIFRA and the ESA. *See* Fed. Opp. at 11-13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel
Douglas T. Nelson
CROPLIFE AMERICA
1156 15th Street, NW
Suite 400
Washington, DC 20005

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Steven P. Quarles
Counsel of Record
Clifton S. Elgarten
J. Michael Klise
Thomas R. Lundquist
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

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[7] Without citing any authority, the Coalition contends (at 25-26) that Petitioners' question concerning the predicate for requiring consultation is moot because EPA has made the threshold "may effect" determinations for the pesticides in question. But, as Federal Respondents' failure to join in this argument suggests, the issue is not moot. Here, the finding of an alleged ESA "violation" has ongoing ramifications because the injunction remains in place, and EPA and the National Marine Fisheries Service must take further steps on each pesticide unless an ESA "no effect" determination is made.